**FARAD CONTINUATION SHEET NO.**
**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**APPELLATE SIDE**
**NAGPUR BENCH, NAGPUR**

Second Appeal No. 43/2006
**(** Vinayak Koduji Kore ***VERSUS*** Lala Sampat Khobragade & another **)**

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| Appeal | District : |
| Application No. | of 200 |
| Writ petition | |

| Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders. | Court's or Judge's orders |
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Mr.Bhattad, Adv. for the appellants.
Mr.Khandpasole, Adv. for the R-1 & 2..

**CORAM : Smt. Vasanti A. Naik, J.**
**DATED : 26th July, 2007.**

Heard learned counsel for the parties.

The appellant is the original plaintiff. The plaintiff filed a suit for permanent injunction restraining the defendants from interfering with the peaceful possession of the plaintiff over the suit property. It was the plaintiff's case that the defendant had agreed to sell the suit property to the plaintiff by an agreement of sale executed on 29.04.1983. The property was to be sold @ Rs.275 per decimal. It was pleaded by the plaintiff that after accepting the consideration, the defendant put the plaintiffs in possession of the suit property. The plaintiff made some construction on the suit property and while doing so, since he had not sought permission for conversion of the land to non agricultural use, the S.D.O. had imposed a fine on the plaintiff and had regularised the construction

later on. The plaintiff claimed that he was in possession of the suit property since the date of agreement of sale.

The defendants nos.1 and 2 filed the written statement and denied the case of the plaintiffs. They denied the execution of the agreement of sale @ Rs.275/- per decimal and had pleaded that the plaintiff had agreed to purchase 7 decimal land @ Rs.250/- per decimal and the remaining land was belonging to the defendant no.2. It was the case of the defendant that the plaintiff made illegal construction on the land because the land was vacant. It was also pleaded that the defendant no.2 was in possession of the open land. Certain other facts were also pleaded in the written statement. The defendants sought for the dismissal of the suit filed by the plaintiff.

The trial Court, on an appreciation of the material evidence on record, dismissed the suit of the plaintiff as the plaintiff had failed to prove the title to the suit property and further failed to prove that on 13.05.1983, the father of the defendant no.2 accepted the whole consideration for sale of the suit property and put the plaintiff in possession of the land in part performance of the agreement of sale. In view of the aforesaid findings, the trial Court held that the plaintiff was not entitled to the relief of permanent injunction as sought for. The trial Court

further held that the plaintiff had neither pleaded nor proved that he was ready to perform his part of the contract by getting the sale-deed executed, and therefore, protection under Section 53A of the Transfer of Property Act could not be given to the plaintiff. The Court further held that the plaintiff failed to prove that he had paid entire consideration to the defendant.

In an appeal carried by the plaintiff to the appellate Court, the findings recorded by the trial Court were confirmed. The appellate Court held that the plaintiff failed to prove that the plaintiff came in possession of the suit land by virtue of the agreement of sale dated 13.05.1983. The Court further held that the plaintiff was not entitled to seek protection under Section 53A of the Transfer of Property Act because there was some interpolation in some words in agreement of sale dated 13.05.1983. The appellate Court, however, further observed that even if the aforesaid fact was ignored Section 53 of the Transfer of Property Act could not be applied in the facts of this case as the plaintiff had neither pleaded nor proved that he had either performed his part of the contract or he was ready and willing to perform his part of the contract.

The appellate Court, therefore, held that the trial Court was right in dismissing the suit. Shri Bhattad, the learned counsel for the appellant,

submitted that the appellate Court was not right in holding that there was some interpolation in some words of the agreement of sale dated 13.05.1983. According to Shri Bhattad, the defendant had not pleaded so in the written statement, and therefore, it was not proper on the part of the appellate court to have recorded the finding to the aforesaid effect. The counsel for the appellant then submitted that the appellant was entitled to the protection under Section 53 of the Transfer of Property Act. It was also submitted by the appellant that even a trespasser is entitled to maintain a suit for permanent injunction against a true owner if he was being dispossessed without following the due process of law.

The submissions made on behalf of the appellant are liable to be rejected. It is no doubt true that the appellate Court after perusing, considering and minutely examining the document dated 13.05.1983 had observed that there were some alterations and interpolations in some words of the agreement dated 13.05.1983. It is not in dispute that the plaintiff was trying to protect his possession over the suit property only on the basis of the agreement of sale executed between the plaintiff and the father of the defendant no.2 on 13.05.1983. The appellate Court, therefore, on examining the document had observed that there

appeared to be some alterations and interpolations in certain words and figures. The Court, therefore, observed that the plaintiff was not entitled to retain his possession on the basis of agreement of sale dated 13.05.1983. However, the appellate Court did not dismiss the appeal filed by the plaintiff only because there were some interpolations in the document dated 13.05.1983. The appellate Court further observed in paragraph no.6 of the judgment that even if there were no interpolations in the document dated 13.05.1983, there was nothing on record to show that plaintiff had averred and proved that he was ready and willing to perform his part of the contract.

I have perused the copy of the plaint. The plaintiff has not pleaded that he was ready and willing to perform his part of the contract. Though the appellate Court may not be justified in observing that there were some interpolations in certain words and figures in document dated 13.05.1983, the finding recorded by the first appellate Court for denying protection to the plaintiff under Section 53A of the Transfer of Property Act is perfectly justified. It is crystal clear that it was not the case of the plaintiff that he was ever ready and willing to perform his part of the contract. The provisions of Section 53A of the Transfer of Property Act cannot be applied for protecting the possession of a party

who is not ready and willing to perform his part of the contract. That is one of the essential conditions under Section 53A of the Transfer of Property Act.

The last submission made by the appellant to the effect that even a trespasser would be entitled to protect his possession against a true owner is also not applicable to the facts of the case as the plaintiff had not prayed that the defendant be restrained from taking the possession from the plaintiff without following due process of law. The plaintiff had in fact made a prayer that a permanent injunction be granted against the defendant restraining the defendant from disturbing the peaceful possession of the plaintiff over the suit property.

The reasons recorded by the trial as well as the appellate Court on the issue of non applicability of Section 53A of the Act to the facts of the case are perfectly legal and justified and no interference is called for, in this second appeal, on these findings recorded by both the Courts.

For the reasons recorded by the trial and the appellate Court and also for the reasons recorded by this Court hereinabove, it is clear that the plaintiff was not entitled to protect his possession against the defendant in view of Section 53A of the Transfer of Property Act.

No substantial question of law arises for

consideration in this second appeal. The second appeal is, therefore, dismissed with no order as to costs.

**JUDGE**

APTE